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June 22, 2007

VIA FEDERAL EXPRESS

Mr. Charles L.A. Terreni

Chief Clerk/Administrator

Public Service Commission of South Carolina

101 Executive Center Dr., Suite 100

Columbia, SC 29210

ORIGINAL
SC PUBLIC SERVICE
COMMISSION
2007 JUN 25 AM 8:52
RECEIVED

RE: Docket No. 2006-37-C

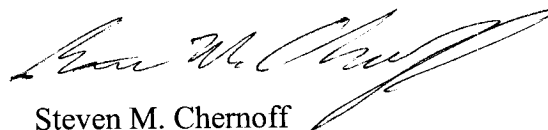
**Petition of the Office of Regulatory Staff for a Rule-Making Proceeding to
Examine the Requirements and Standards to Be Used by the Commission
When Evaluating Applications for Eligible Telecommunications Carrier
(ETC) Status and When Making Annual Certification of ETC Compliance to
the Federal Communications Commission**

Dear Mr. Terreni:

Enclosed for filing are the original and ten (10) copies of the Motion to Accept Late-Filed Comments of Hargray Wireless, LLC ("Hargray").

I have enclosed an extra copy, which I ask that you date stamp and return to me. If you have questions, please do not hesitate to contact me.

Sincerely,



Steven M. Chernoff

Enclosure

cc: All Parties of Record

**BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

**In the Matter of Consideration of Regulations)
Regarding the Designation of Eligible)
Telecommunications Carriers)**

Docket No. 2006-37-C

SC PUBLIC SERVICE
COMMISSION

2007 JUN 25 AM 8:52

RECEIVED

**HARGRAY WIRELESS, LLC
MOTION TO ACCEPT LATE-FILED COMMENTS**

Hargray Wireless, LLC ("Hargray"), by its counsel, hereby submits this Motion requesting that the Commission accept the attached late-filed Comments originally prepared for filing with the Commission on June 1, 2007, pursuant to the Commission's Notice filed March 26, 2007. As explained below, the Comments were finalized, signed and forwarded to administrative staff for filing, but were apparently not sent to the Commission for filing due to a clerical error.

On May 31, 2007, undersigned counsel prepared the attached Comments on behalf of Hargray and instructed office staff to send the Comments to the Commission via Federal Express for early next-day delivery. Several filings have been made on behalf of Hargray in this manner, both prior to and subsequent to the filing in question. With each filing, undersigned counsel's office staff encloses an additional copy with a request that the Commission's docketing staff date-stamp and return in an enclosed envelope. Earlier today, not having received the requested date-stamped copy of the Comments from the Commission's docketing staff, undersigned counsel looked on the Docket Management System on the Commission's web site and noticed Hargray's June 1 Comments do not appear on the system.

Although the Comments were finalized, signed, and forwarded to office staff on the

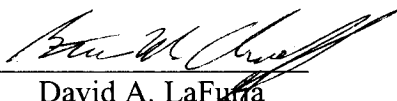
afternoon before the filing deadline for transmittal to the Commission in the usual manner, undersigned counsel can find no evidence that the Comments were actually sent. The likely explanation is that undersigned counsel's office staff failed to complete the task of transmitting the Comments because of the large volume of filings being submitted that evening to the FCC.

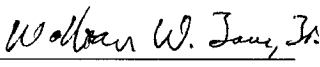
Hargray submits that a grant of this Motion will provide for a more complete record in this case, and that the Commission will therefore benefit from the inclusion of the attached Comments. No party will be prejudiced by the inclusion of the attached Comments in the record; indeed, Hargray's counsel will participate in the hearing and be prepared to answer questions regarding the advocacy positions set forth in those Comments.

Accordingly, Hargray requests that the Commission accept the late-filed comments provided herewith.

Respectfully submitted,

HARGRAY WIRELESS, LLC

By: 
David A. LaFuria
Steven Chernoff

By:  (SMC)
William W. Jones, Jr.

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Dated: June 22, 2007

**BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

**In the Matter of Consideration of Regulations)
Regarding the Designation of Eligible)
Telecommunications Carriers)**

Docket No. 2006-37-C

COMMENTS OF HARGRAY WIRELESS, LLC

Hargray Wireless, LLC ("Hargray"), by its counsel, hereby submits the following comments regarding the Commission's draft ETC designation rules ("Draft Rule") in response to the Commission's Notice filed March 26, 2007, in the above-captioned matter.

I. INTRODUCTION

Hargray believes the Commission's Draft Rule generally promotes the FCC's objective of establishing a uniform set of criteria resulting in a predictable universal service support mechanism for both incumbents and competitors. In this regard, Hargray offers only very limited suggestions for clarification or modification. For example, the two-year service quality improvement plan requirement should clarify that carriers are not required to achieve ubiquitous network coverage at the end of two years. Also, while the new proposed language acknowledges the need for a technologically neutral geographic reporting basis for purposes of the two-year plan, Hargray submits that a cell-site-by-cell-site approach fails to recognize that service quality improvements may be brought about by investments in projects other than new cell sites. Another provision that may be clarified is the local usage comparability rule, to incorporate the FCC's total-service approach to comparing competitive and incumbent rate plans. Finally, the public interest section should be revised to reflect the fact that cream-skimming is one of several factors and that an adverse finding on cream-skimming may be outweighed by other public

interest considerations.

II. DISCUSSION

In the *ETC Report and Order*, the FCC encouraged states to require carriers “to meet the same conditions and to conduct the same public interest analysis outlined in this Report and Order.”¹ Consistent with the FCC’s guidance, Hargray has urged the Commission to adopt a set of rules that is largely based on the FCC’s guidelines and applicable to both incumbents and competitors.² Earlier this year, the Commission issued a notice of drafting that opened a set of proposed designation and certification rules to public comment.³ In response, Hargray noted that the draft ETC rules were generally consistent with the FCC’s guidelines and would further the goals of the 1996 Act, and made some suggested modifications.⁴ The Draft Rule attached to the Notice contain limited modifications to the proposed designation rules. Hargray will focus its comments primarily on the modifications since the previous version of the proposed rules.

A. **The Draft Rule Requiring a Service Quality Improvement Plan Is Appropriate, Subject to Two Important Modifications.**

The Draft Rule properly follows the example of several other states by adopting the FCC’s network construction reporting requirement with a two-year horizon instead of five years. Hargray believes this approach recognizes the difficulty of planning network investments beyond two years while ensuring the Commission has the means to verify whether an ETC is using its

¹ *Federal-State Joint Board on Universal Service, Report and Order*, 20 FCC Rcd 6371, 6396 (2005) (“*ETC Report and Order*”).

² See Comments of Hargray Wireless, LLC (filed Aug. 1, 2006) at pp. 2-3.

³ See Notice of Drafting (filed Feb. 8, 2007).

⁴ See Comments of Hargray Wireless, LLC (filed Feb. 21, 2007) at p. 2.

support appropriately.⁵ At the same time, Hargray believes the final rule should incorporate two important changes that would clarify an ETC's obligations and make the rule more competitively neutral.

1. The Rule Should Clarify That The Two-Year Plan Is a Rolling Requirement.

Draft Rule C(a)(1)(B) would require an ETC applicant to submit a plan demonstrating how support will be used for upgrades and improvements to its network over its first two years as an ETC. It is unclear from the Draft Rule whether the two-year plan is a rolling commitment, whether it requires ubiquitous build-out at the end of two years, or whether the planning and reporting obligation simply expires after two years.

The Draft Rule should clarify that the two-year plan is a rolling requirement. In other words, an ETC will be required to submit a new plan each year that contains a progress report and a plan for continued improvements and upgrades for the next two years. Without this clarification, the rule could be read to extinguish an ETC's expenditure reporting obligations after its first two years as an ETC, because the rule only makes reference to a carrier's initial two-year plan. Alternatively, the Draft Rule could be read contain an unlawful requirement that an ETC must build out its network ubiquitously within its first two years as an ETC. Such an interpretation would be unlawful because the operative federal statute does not require *any* ETC, including an ILEC, to construct facilities throughout 100% of its ETC service area within a specific period of time. On the contrary, a carrier may fulfill its obligation as an ETC in a service area by providing service "*either using its own facilities or a combination of its own*

⁵ See Hargray Comments at pp. 8-10.

*facilities and resale of another carrier's services.”*⁶

2. ETCs Should Be Permitted to Report at the County Level.

Any final rules adopted in this proceeding will be applicable to some ETCs or ETC applicants that provide service using wireless technology. Cellular and PCS operators are authorized to provide service in geographic areas determined by the FCC, including Rural Service Areas (“RSA”), Metropolitan Statistical Areas (“MSA”), and Basic Trading Areas (“BTA”).

In its comments submitted in February, Hargray explained that the use of a wireline-specific geographic area for reporting wireless infrastructure improvements would not be competitively neutral, because wireless carriers do not use wire centers when planning the type and location of facilities to be constructed or upgraded for the provision of wireless service. Wire center-specific reporting is also unnecessary because competitive ETCs do not report lines and receive support based on wire center, but by ILEC study area or, in limited instances, cost zone.

In the new Draft Rule, Hargray appreciates that an accommodation is made for wireless technology. However, it would be inappropriate to permit reporting solely on the basis of cell sites, because ETC investments can take many other forms besides cell site construction or upgrades. For example, a wireless ETC may use support to fund all or a portion of a switch upgrade. Therefore, Hargray recommends that instead of using cell sites, the Commission permit wireless ETCs to report on a county-by-county basis. Wireless carriers are better equipped to deal with county boundaries because FCC-licensed areas generally follow county boundaries.

⁶ See 47 U.S.C. Section 214(e)(1). An ETC does not receive support for lines served entirely through resale. Accordingly, an ETC serving a customer solely via resale has a strong incentive to upgrade or expand its network so that it can transition that customer to facilities-based service as quickly as possible.

Hargray is aware that the Nebraska Public Service Commission recently proposed a rule that would allow both incumbent LECs and wireless ETCs to choose either wire centers or counties as the geographic basis for reporting ETC expenditures.⁷

Accordingly, Hargray proposes the following changes to the Draft Rule provisions concerning the two-year plan:

Section C(a)(1)(B) should be changed to read as follows:

(B) submit a two-year plan that describes with specificity proposed improvements or upgrades to the applicant's network on a wire center-by-wire center or county-by-county basis throughout its proposed designated service area. Each applicant shall demonstrate how signal quality, coverage or capacity will improve due to the receipt of high-cost support throughout the area for which the ETC seeks designation; the projected start date and completion date for each improvement; the estimated amount of investment for each project that is funded by high-cost support; the specific geographic areas where the improvements will be made; and the estimated population that will be served as a result of the improvements. If an applicant believes that service improvements in a particular wire center or county are not needed, it must explain its basis for this determination and demonstrate how funding will otherwise be used to further the provision of supported services in that area. Upon designation, an ETC's two-year plan will be updated annually on a rolling basis as set forth in Section D(a)(1) of this Rule.

B. The Local Usage Comparability Requirement Should Incorporate the FCC's Total-Service Approach.

The Draft Rule again follows the FCC's rules by requiring competitive ETCs to offer a rate plan that is comparable to the local service offering of the incumbent LEC serving the same area. Hargray believes this requirement is generally fair, but that it contains an ambiguity that

⁷ In the Matter of the Nebraska Public Service Commission, on its own motion, seeking to establish guidelines for the purpose of certifying the use of federal universal service support, Order Seeking Comment, Application No. NUSF-25 (Neb. PSC Feb. 26, 2007).

opens the door to unlawful rate regulation. Specifically, the rule suggests that a competitive ETC may be required to show that it offers a rate plan that matches a wireline carrier's rate plan by offering unlimited local usage, or by matching the artificially low monthly rate and small local calling areas offered by ILECs.

To be clear, the FCC did not define comparability to mean a CETC must create a rate plan to match the ILEC's service offering. Rather, it stated:

We believe the [state] Commission should review an ETC applicant's local usage plans on a case-by-case basis. For example, an ETC applicant may offer a local calling plan that has a different calling area than the local exchange area provided by the LECs in the same region, or the applicant may propose a local calling plan that offers a specified number of free minutes of service within the local service area. We also can envision circumstances in which an ETC is offering an unlimited calling plan that bundles local minutes with long distance minutes. The applicant may also plan to provide unlimited free calls to government, social service, health facilities, educational institutions, and emergency numbers.⁸

Draft Rule section C(a)(4) would track the FCC's permissive guideline requiring an ETC petitioner to demonstrate that it offers "a local usage plan comparable to the one offered by the incumbent local exchange carrier in the areas for which the carrier seeks designation." However, the Draft Rule does not contain the FCC's discussion of what "comparable" means in this context. In adopting any rule, Hargray urges the Commission to make clear that "comparable" does not impose a requirement to replicate ILEC rate plans.

Under federal law, states cannot regulate rates of CMRS carriers, even if the CMRS carrier is an ETC.⁹ Rate regulation has been interpreted broadly by the courts¹⁰ and by the

⁸ *FCC ETC Order, supra*, 20 FCC Rcd at 6385 (footnotes omitted).

⁹ See 47 U.S.C. Section 332(c)(3); *Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, 17 FCC Rcd 14802, 14820, para. 33 (2002) ("*State Independent Alliance*") ("Kansas is precluded and preempted from imposing rate and entry regulations on Western Wireless' BUS offering, but Kansas may regulate other terms and conditions, and Kansas may impose

FCC.¹¹ Additionally, the *TOPUC* decision by the Fifth Circuit confirmed that Section 254(f) of the Act — which allows a state to “adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service” — cannot be read to supersede the preemptive effect of Section 332(c)(3).¹² In sum, Congress made no “universal service exception” to its preemption of CMRS rate regulation.

Hargray submits that this is why the FCC decided to only require CETCs to have one rate plan that is comparable with that offered by ILECs. In so doing, the FCC did not mandate unlimited local usage or any particular rate structure, but left it open for each state to determine comparability on a case-by-case basis, taking into account local calling areas, price, and other factors.¹³ Accordingly, the final rules should incorporate the FCC’s case-by-case, total-service analysis discussed above, whether explicitly or by reference.

universal service regulations that are not inconsistent with section 332(c)(3)(A), other provisions of the Act, and the Commission’s regulations.”). See also *WWC Holding Co., Inc. v. Sopkin et al.*, Civ. Action No. 04-cv-01682-RPM, ___ F.Supp. 2d ___, 2006 WL 581161 (D-Colo., Mar. 8, 2006) (concluding that a state commission’s conditioning of ETC status on PUC approval of a wireless carrier’s rate plans constituted preempted rate regulation).

¹⁰ See *Cellco Partnership v. Hatch*, 431 F.3d 1077 (8th Cir. 2005)(holding Minnesota “Wireless Consumer Protection” Act preempted by 47 U.S.C. § 332(c)(3) as rate regulation); *Bastien v. AT&T Wireless Service, Inc.*, 205 F.3d 983, 989 (7th Cir. 2000). See also *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 223 (1998) (“Rates. . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. If ‘discrimination in charges’ does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge . . . An unreasonable ‘discrimination in charges,’ that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price.”) (internal quotations omitted).

¹¹ See *Southwestern Bell Mobile System, Inc., Memorandum Opinion and Order*, 14 FCC Rcd 19898, 19907, para. 20 (1999) (“[W]e find that the term ‘rates charged’ in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these.”) (emphasis in original).

¹² See *TOPUC*, *supra*, 183 F.3d at 431.

¹³ See *FCC ETC Order*, *supra*, 20 FCC Rcd at 6385, para. 33.

C. The Public Interest Analysis Balances Several Factors, None of Which is Necessarily Dispositive.

Draft Rule 103-690(C)(b) properly reflects the multiple factors comprising the public interest analysis set forth in the FCC's *ETC Report and Order*. These are, *inter alia*, the benefits of increased consumer choice; the advantages and disadvantages of the applicant's service offerings; and the likelihood that cream-skimming will occur in rural ILEC areas only partially within the proposed ETC service area. However, the Draft Rule states that the Commission "will deny designation if it concludes that the potential for creamskimming exists." Hargray submits that a rule compelling automatic denial upon a finding of a "potential" for creamskimming would fail to accord due importance to other public interest factors, including those specifically set forth above and in the Draft Rule. The FCC's rules do not mandate denial upon an adverse cream-skimming finding. 47 C.F.R. Section 54.202(c). This is because the potential for cream-skimming may be only slight, or there may be other public interest factors that mitigate or compensate for the potential for cream-skimming. One recent example is an order in which the Kansas Corporation Commission found that the potential for cream-skimming existed, but ruled in favor of a grant in those areas after considering several other factors.¹⁴

Accordingly, Hargray recommends the omission of the sentence stating that "The Commission will deny designation if it concludes that the potential for creamskimming exists."

¹⁴ In the Matter of the Application of USCOC of Nebraska/Kansas LLC d/b/a U.S. Cellular, Docket No. 06-USCZ-519-ETC, Order on Reconsideration (March 30, 2006) at para. 9 (finding that the potential for cream-skimming was present, but concluding that it was mitigated by: the size of the holding company that owned the rural ILEC in question; the location of the rural ILEC wire centers far apart on opposite sides of the state; the fact that all portions of the rural ILEC's service area were sparsely populated such that there was no "cream" to skim; and the ability of the rural ILEC to disaggregate support if it was concerned about cream-skimming).

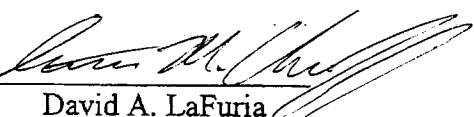
III. CONCLUSION

Hargray recommends adopting the proposed ETC designation rules, subject to the modifications proposed herein.

Respectfully submitted,

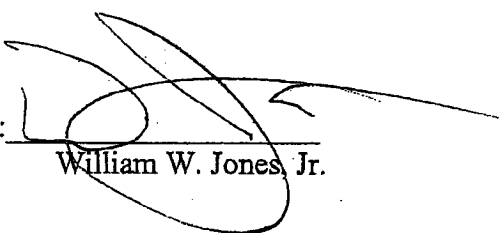
HARGRAY WIRELESS, LLC

By:


David A. LaFuria
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P.O. Drawer 7049
Hilton Head, SC 29938

Dated: June 1, 2007

CERTIFICATE OF SERVICE

I, Donna L. Brown, hereby certify that on this 31st day of May 2007, copies of the foregoing **COMMENTS OF HARGRAY WIRELESS, LLC** was placed in the United States mail, via first class, postage prepaid to:

C. Lessie Hammonds, Esq.
State of South Carolina
Office of Regulatory Staff
P.O. Box 11263
Columbia, SC 29211

Nanette Edwards, Esq.
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A handwritten signature in black ink, appearing to read "Donna Brown", written over a horizontal line.

Donna L. Brown

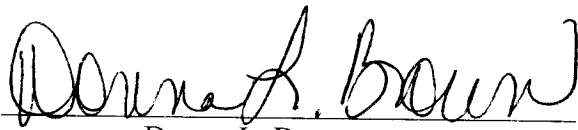
CERTIFICATE OF SERVICE

I, Donna L. Brown, hereby certify that on this 22nd day of June 2007, copies of the foregoing, **Hargray Wireless, LLC's Motion to Accept Late-Filed Comments**, was placed in the United States mail, via first class, postage prepaid to:

C. Lessie Hammonds, Esq.
State of South Carolina
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Donna L. Brown